

**Amendments to the Drawings:**

Applicant attaches replacement sheets 1-3 including formal versions of FIGURES 1-5. Replacement sheets 1-3 replace original sheets 1-3 containing FIGURES 1-5. No substantive amendments are made to the figures.

Attachment: Replacement Sheets 1-3

### **REMARKS**

This present Response is being filed in reply to the Office Action dated July 16, 2007. By the present amendment, claim 1 is amended, claims 21-29 are canceled, and claims 34-36 are withdrawn from consideration. Claims 1-20 and 30-36 are pending in the application. Claims 21-29 are canceled solely to reduce the total number of claims in the application, excluding the withdrawn claims, to twenty-five (25) or below. Applicant reserves the right to prosecute the same or similar claims in this or a subsequent patent application.

#### ***Drawings***

The drawings were objected to for various informalities. Applicant submits replacement formal drawings in response to this objection. No substantive amendments are made to the drawings.

#### ***Claim Objections***

By the present amendment, Claim 1 is amended to address informality noted by the Examiner.

#### ***Rejection Pursuant to 35 U.S.C. § 103(a)***

The Office Action rejected claims 1-14 and 16-33 pursuant to 35 U.S.C. § 103(a) as being unpatentable over Pagliuca (US Patent Application Publication 2003-0073998) in view of Chin (US Patent Application Publication 2005-0065517). The Office Action rejected claim 15 pursuant to 35 U.S.C. § 103(a) as being unpatentable over Pagliuca (US Patent Application Publication 2003-0073998) in view of Chin (US Patent Application Publication 2005-0065517) and in further view of Nguyen et al. (US Patent Application Publication 2004-0215190). Applicant respectfully traverses these rejections based on the following arguments.

Independent claim 1 recites a minimally invasive surgical method in which a first anchor and a second anchor are inserted through a first pathway created by a first incision

and a third anchor is inserted through a percutaneous incision. A first end of a fixation element is advanced subcutaneously from the first pathway to the third anchor. Claims 2-19 depend from claim 1.

Independent claim 20 recites a minimally invasive surgical method in which a first anchor and a second anchor are positioned through a first incision to first vertebra and a second vertebra, respectively, and a third anchor is positioned through an incision distinct from the first incision. A first end of a fixation element is advanced subcutaneously from the first incision to the third anchor.

Independent claim 30 recites a minimally invasive surgical method in which a first bone screw and a second bone screw are positioned through a first incision to the pedicle of a first vertebra and to the pedicle of a second vertebra, respectively, and a third bone screw is positioned through a second incision distinct from the first incision. A first end of a spinal rod is advanced subcutaneously from the first incision to the third anchor. Claims 31-33 depend from claim 30.

As noted in the Office Action, Pagliuca fails to disclose inserting a third anchor through a percutaneous incision, as recited in claim 1, and fails to disclose positioning a third anchor, such as a bone screw, in an incision distinct from a first incision receiving a first and second anchor, as recited in claims 20 and 30. Nor does Pagliuca disclose advancing a first end of a fixation element subcutaneously to a third anchor or bone screw, as recited in claims 1, 20, and 30. The Office Action relies on Chin for teaching these and other steps of the rejected claims. However, the Office Action provides no rationale as to why it would have been obvious for one of ordinary skill in the art to combine the purported teachings of the two references. The Office Action states only that it would have been obvious to combine the two references “to perform minimally invasive surgery.” Page 5 of the Office Action. The Supreme Court quoting *In re Kahn*, (78 USPQ2d 1329, 1336 (Fed. Cir. 2006)) stated that “[R]jections on obviousness cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *KSR International Co. v. Teleflex Inc.*, 82 USPQ2d 1385, 1396(2007). The Office Action has fails to articulate reasoning with rational underpinnings to support the conclusion that it would have been obvious for one of ordinary skill in the art to

combine the purported teachings of the two references. For this reason, the Office Action has failed to set forth a prima facie case of obviousness of claims 1 and 20.

Moreover, Applicants submit that no rationale as to why it would have been obvious for one of ordinary skill in the art to combine the purported teachings of Pagliuca and Chin in the manner set forth in the Office Action exists. One of ordinary skill in the art would recognize that Pagliuca teaches minimally invasive surgical procedures through a single incision using a expandable access device that allows visualization of the entire surgical area to be treated, e.g., one side of multiple vertebra, with an endoscope or other visualization device and procedures to be completed on the vertebra, such as instrumentation of one side of the vertebra. One of ordinary skill in the art would recognize that Chin teaches the advantages of separate percutaneous incisions to access each vertebra to be instrumented, *in contrast to using the type of expandable access devices and methods disclosed in Pagliuca*.

“The invention also provides the ability to sequentially connect a fixation device percutaneously between more than two points simultaneously and only directly visualizing the fixation points and not the entire connecting device. This scalable feature is currently a major limitation of other minimally access devices.” Chin at paragraph 15.

Thus, Chin specifically teaches away from combining the teachings of Pagliuca and Chin.

For at least these reasons, Applicants respectfully request that the rejection of independent claim 1, and claims 2-19 dependent thereon, claim 20, and claim 30, and claims 31-33 dependent thereon, be withdrawn.

***Conclusion***

In view of the remarks set forth above, it is respectfully submitted that this application is in condition for allowance. Accordingly, allowance is requested. If there are any remaining issues or the Examiner believes that a telephone conversation with the Applicant's attorney would be helpful in expediting the prosecution of the application, the Examiner is invited to call the undersigned at (508) 880-8488.

Respectfully submitted,

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Date: October 16, 2007